STATE OF MICHIGAN

COURT OF APPEALS

THOMAS BILAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
v	No. 309345 Monroe Circuit Court
MICHAEL MURCHIE and MONROE PUBLIC SCHOOL DISTRICT, Defendants-Appellants.	LC No. 11-030410-NI

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In this claim for damages allegedly arising from the negligent operation of an automobile, defendant Monroe Public School District and the School District's employee, Michael Murchie, appeal by right the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). In their motion, the School District and Murchie argued that they were entitled to the dismissal of plaintiff Thomas Bilan's claims because his claims were barred by governmental immunity. We agree that the trial court erred when it denied Murchie's motion because no reasonable jury could find that Murchie's driving amounted to gross negligence given the undisputed facts. However, in response to the School District's motion, Bilan presented evidence that established a question of fact as to whether his injuries resulted from the accident at issue. Accordingly, the trial court did not err when it denied the School District's motion for summary disposition on the ground that Bilan failed to establish that his injuries resulted from Murchie's negligent operation of the pickup truck. For these reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

In April 2009, Bilan had open heart bypass surgery. The surgery involved bisecting his sternum, but he appeared to recover well. After the surgery, Bilan obtained a tricycle that he used to ride around.

In September 2009, Bilan was riding his tricycle to visit friends when he decided to return home after it began to rain. He stopped at a light and started to cross after the light turned red. Bilan testified at his deposition that he saw a pickup truck approaching the intersection and had just arrived in front of it when he realized that it was not going to stop. He said that the truck was slowing as it approached the light. Bilan testified that he knew the truck's driver, Murchie, and realized that Murchie was looking to the left to "turn right on the red light" and just did not see that he was in front of the truck. At the time of the accident, Murchie was driving the truck on behalf of his employer, the School District.

Bilan said he could hear the truck's passengers yelling at Murchie to stop, but that Murchie drove into him before he could hit the brakes:

> I would say it [the truck] wasn't moving very fast at all because he [Murchie] realized that I was in the front and hit his brakes, but when he hit his brakes he had already hit me, you know. I think that's how you could word it that way where I was—he wasn't moving completely fast where when he realized that I was in front of the truck and the other two guys yelling out that wham the truck hit me, but he came to a stop `cause it spun me around where I was facing and I can still see a picture of those three guys right in front of me.

Bilan said that he was knocked off his seat, but did not fall. The tricycle was tipped up and he stood there with his hands on the truck's hood. Bilan walked his tricycle over to the side of the road and one of the passengers asked if he was ok and he responded that he was. They then drove off.

Bilan said he composed himself for a few moments and rode the tricycle back home. His tricycle's right handbrake was damaged in the accident and he replaced it himself; he also had to tighten some spokes.

Bilan reported to his physician in May 2010 that he had begun to experience a "clicking" in his chest after the accident. Although the histories from his medical reports indicate that he told his doctors that he had been involved in multiple accidents, including ATV accidents, automobile accidents and a fall from a roof, Bilan denied that he had been involved in any such accidents. Bilan had surgery to try and mechanically correct the problem in September 2010, but he stated that he continued to experience problems after the surgery.

In February 2011, Bilan sued the School District and Murchie. He alleged that Murchie's negligent driving caused his injuries and that the School District was vicariously liable for Murchie's negligence. He also alleged that Murchie was not entitled to governmental immunity because the accident resulted from Murchie's gross negligence. Bilan alleged that the School District was also not immune because the accident fell under the motor vehicle exception to governmental immunity. See MCL 691.1405.

The School District and Murchie moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) in February 2012. Murchie argued that, under the undisputed facts, no reasonable jury could find that his failure to yield to Bilan amounted to gross negligence, as required under MCL 691.1407(2)(c). The School District argued that it was entitled to immunity because Bilan could not prove that his injuries "resulted from" the accident within the meaning of MCL 691.1405. The School District also argued that Bilan's injuries did not meet the serious impairment threshold. See MCL 500.3135(1).

After hearing oral arguments, the trial court determined that there was a question of fact on the issues raised in the motion for summary disposition. For that reason, the trial court entered an order denying the motion in March 2012.

The School District and Murchie then appealed the trial court's order to the extent that it denied that they were entitled to governmental immunity. See MCR 7.202(6)(a)(*v*) (treating an order denying governmental immunity as a final judgment).

II. GOVERNMENTAL IMMUNITY

A. STANDARD OF REVIEW

Both the School District and Murchie argue that the trial court erred to the extent that it denied their motion for summary disposition under MCR 2.116(C)(7) and (C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

B. GOVERNMENTAL IMMUNITY

Summary disposition is appropriate where the plaintiff's claim is barred under immunity granted by law. See MCR 2.116(C)(7). The Legislature has provided broad immunity from tort liability to governmental agencies, such as the School District, and their employees, such as Murchie. See MCL 691.1407; *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000) (stating that the Legislature's grant of immunity is broad and the exceptions to that immunity must be narrowly construed). Moreover, governmental immunity is not a type of affirmative defense; rather, it is a characteristic of government. *Mack v Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002). There is, for that reason, a "presumption" that a governmental agency is immune from tort liability and it is the plaintiff's burden "to demonstrate that [his or her] case falls within one of the exceptions." *Id.*

> In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although generally not required to do so, see MCR 2.116(G)(3), a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id.*, citing MCR 2.116(G)(5). The

> reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich. Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). [*Kincaid v Cardwell*, ___ Mich App ___, slip op at 4; ___ NW2d ___ (2013) (Docket No. 310045).]

Once a defendant makes a properly supported motion for summary disposition asserting governmental immunity under MCR 2.116(C)(7), the burden shifts to the plaintiff to show that the governmental agency or employee is not entitled to immunity. See *Kincaid*, ___ Mich App, slip op at 12 and n 6 (holding that the burden shifting approach for questions of fact under MCR 2.116(C)(10) applies to questions of fact concerning immunity provided by law in a motion under MCR 2.116(C)(7)).

C. GROSS NEGLIGENCE

The Legislature provided that a governmental agency's employee is "immune from tort liability" caused by the employee "while in the course of employment" and "while acting on behalf of a governmental agency," if all the following are true: (1) the employee was "acting or reasonably believe[d that] he or she [was] acting within the scope of his or her authority; (2) the "governmental agency [was] engaged in the exercise or discharge of a governmental function"; and, (3) the employee's "conduct [did] not amount to gross negligence that [was] the proximate cause of the injury or damage." MCL 691.1407(2). Here, there was no dispute that Murchie was the School District's employee, that he was acting on the School District's behalf in the course of his employment, that he was acting or believed that he was acting within the scope of his authority, and that Murchie was exercising a governmental function on behalf of the School District at the time of the accident. As such, the only question was whether there was evidence from which a reasonable finder of fact could find that Murchie's conduct amounted to gross negligence. See MCL 691.1407(2)(c).

As this Court has explained, "[i]n order to survive a motion for summary disposition premised on the immunity afforded to governmental employees, the plaintiff must present evidence sufficient for a reasonable trier of fact to conclude that the employee was grossly negligent." *LaMeau v Royal Oak*, 289 Mich App 153, 175; 796 NW2d 106 (2010), rev'd not in relevant part 490 Mich 949 (2011). And gross negligence is plainly more substantial than the type of conduct that amounts to ordinary negligence; it is conduct that is "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Accordingly, a plaintiff cannot survive a motion for summary disposition premised on the immunity provided under MCL 691.1407(2) by presenting evidence that the employee's conduct amounted to ordinary negligence. *Maiden*, 461 Mich at 122-123. Rather, there must be evidence that the "contested conduct was substantially more than negligent." *Costa v Community Med Servs, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). If the reviewing court concludes that, even viewing the evidence submitted by the parties in the light most favorable to the non-moving party, no reasonable jury could find that the employee's conduct amounted to gross negligence, the court must dismiss the plaintiff's claim. *Jackson v Saginaw County*, 458 Mich 141, 146; 580 NW2d 870 (1998).

Murchie argued before the trial court that the evidence showed that his conduct did not amount to gross negligence as a matter of law. Murchie relied on Bilan's own testimony about the accident to show that no reasonable trier of fact could find that Murchie was grossly negligent. In response, Bilan argued that the evidence that Murchie failed to "brake properly" was sufficient to create a question of fact on the issue of gross negligence.

Bilan's own testimony established that Murchie's conduct did not amount to gross negligence. Bilan testified that Murchie appeared to approach the intersection with the intent to turn right. He said Murchie slowed down and was looking to the left to see if there was oncoming traffic before he turned. He even opined that Murchie did not intend to hit him, but simply did not see him crossing in front of the truck. Bilan's testimony also showed that Murchie was travelling quite slow; indeed, he did not apply his brake until after he hit Bilan and yet he did not roll over Bilan or his tricycle; in fact, Bilan testified that there was no significant damage to his tricycle and he felt no need to get immediate help. Bilan did not even fall off his tricycle and was able to ride it home shortly after the incident.

Taken in the light most favorable to Bilan, Bilan's testimony established that Murchie came to a slow rolling stop, or stopped and then proceeded slowly, without first checking to see if the crosswalk was free of pedestrians or cyclists. Because he did not make a proper visual check before proceeding, he did not see Bilan and struck him, albeit at a very low speed. A reasonable driver would check for both oncoming vehicular traffic and for persons using the crosswalk. This testimony was sufficient to raise a question of material fact as to whether Murchie was negligent. But Bilan could not meet his burden by presenting evidence that permitted an inference of ordinary negligence; he had to come forward with evidence that Murchie's conduct was substantially more than negligent. This testimony did not permit an inference that Murchie was so reckless that it could be said that he acted with "a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Indeed, the fact that he maintained control of the truck, slowed, and looked for oncoming vehicles, showed that he was exercising some degree of care and concern—even if it was inadequate to safeguard someone crossing in the crosswalk. Considering the evidence presented to the trial court on the motion, we conclude that no reasonable jury could find that Murchie's failure to properly look out for persons in the crosswalk before proceeding to turn amounted to gross negligence. Consequently, the trial court should have granted Murchie's motion to dismiss on the grounds that Bilan's claim was barred under MCL 791.1407(2). *Jackson*, 458 Mich at 146.

D. MOTOR VEHICLE EXCEPTION

The Legislature also provided immunity from tort liability to governmental agencies when the agency is engaged in the exercise or discharge of a governmental function. See MCL 691.1407(1). Here, there is no dispute that the School District is a governmental agency and that it was engaged through Murchie in the exercise or discharge of a governmental function at the time of the accident at issue. Therefore, the School District would be immune from tort liability unless Bilan established that one of the exceptions to the School District's immunity applied to the facts of this case. See *LaMeau*, 289 Mich App at 168. In this case, Bilan alleged that the exception to governmental immunity provided under MCL 691.1405—the so-called motor vehicle exception—applied to the School District.

A governmental agency remains liable "for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405. Because the Legislature limited this exception to situations involving injuries and damage "resulting from" the negligent operation of a motor vehicle, our Supreme Court has determined that a plaintiff must establish something more than that the negligent operation of the vehicle proximately caused the injuries or damage. *Robinson*, 462 Mich at 456-457, 457 n 14; see also *Curtis v City of Flint*, 253 Mich App 555, 561-562; 655 NW2d 791 (2002). In the case of a motor vehicle accident, the plaintiff must show that the government agency's vehicle hit the vehicle at issue or forced it off the road or into another vehicle or object. *Robinson*, 462 Mich at 457.

In its motion for summary disposition, the School District argued that Bilan's medical records did not show that his injury—the clicking noise and associated problems—actually resulted from the accident at issue. Although his medical records showed that Bilan told his doctors that the clicking in his chest began after the accident, the School District found it noteworthy that Bilan's medical reports showed that he had been involved in ATV and automobile accidents, and had fallen from a roof, during the relevant timeframe; it presumably found this evidence noteworthy because it believed it permitted an inference that Bilan's injuries might have been caused by a different accident. However, the School District did not offer any evidence that a medical professional had opined that Bilan's injuries might have been proximately caused by an accident other than the one at issue. That being said, the School District did correctly note that Bilan's records did not contain an expert opinion that the accident at issue likely caused Bilan's injury. As such, the School District properly supported its motion by summarizing Bilan's evidence and showing that the evidence was insufficient to establish the requisite causal connection. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (stating that the moving party can meet its initial burden by demonstrating that the non-moving party's evidence is insufficient to establish an essential element). At that point, the burden shifted to Bilan to show that there was, at the very least, a question of fact as to whether his injuries resulted from the accident with the School District's pickup truck. *Kincaid*, ___ Mich App, slip op at 12 and n 6.

In response to the School District's motion, Bilan presented an October 2010 letter from his surgeon to two other doctors. In the letter, the surgeon related the efforts that he had taken to relieve Bilan's symptoms, but noted that those efforts had been unsuccessful:

> Previously, we were unable to appreciate any actual clicking; however, on exam today we had him bending over as if to lift up an object and we were finally able to feel a click. This is actually laterally, not at the midline at all and appears what he has done, is that he disarticulated the insertion of his ribs at the costal margin in the cartilaginous portion coming into the sternum. It is actually fairly lateral off of the midline. Mr. Bilan notes that he never had this symptom after his initial surgery and this is all new since his auto accident, so I think that in retrospect he actually disarticulated the cartilaginous insertion of his costal margin at the time of his accident.
>
> I explained to Mr. Bilan that unfortunately, I have seen this a few times after auto accidents or falls and I found that repairs to this area can be fairly challenging.

This letter, when viewed in the light most favorable to Bilan, permits an inference that Bilan's injuries resulted from the accident at issue. Bilan's surgeon stated his belief that, on the basis of Bilan's symptoms and the efforts that they had taken to correct the problem, Bilan suffered a particular injury (disarticulated cartilage) in the automobile accident. Because the School District did not proffer any evidence by a medical professional who opined that Bilan's injuries were likely caused by any other source, and did not otherwise contradict or challenge the opinion stated in this letter, there was a question of fact as to whether the accident at issue caused the clicking in Bilan's chest along with its associated symptoms. Consequently, the trial court did not err when it denied the School District's motion for summary disposition on the ground that Bilan could not establish the causation required under MCL 691.1405 to avoid governmental immunity.

III. CONCLUSION

Given the undisputed evidence presented to the trial court concerning the circumstances of the accident, no reasonable jury could find that Murchie's conduct amounted to gross negligence. For that reason, the trial court should have granted Murchie's motion to dismiss on the grounds that Bilan's claim was barred by governmental immunity. However, the trial court did not err when it determined that Bilan had established a question of fact—on the record then before the trial court—as to whether his injuries resulted from the accident at issue. Consequently, the trial court properly denied the School District's motion. For these reasons, we affirm the trial court's order to the extent that it denied the School District's motion for summary disposition on the ground that Bilan's claim against it was barred by governmental immunity. However, we reverse the trial court's decision to deny Murchie's motion for summary disposition and remand for entry of an order dismissing Bilan's claims against Murchie.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We further order that none of the parties may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray